In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION, a corporation,

Petitioner,

vs.

EL DORADO TERMINAL COMPANY, a corporation,

Respondent.

Brief of General American Tank Car Corporation, Petitioner

ALLAN P. MATTHEW,
JOHN O. MORAN,
Attorneys for Petitioner.

W. S. HEFFERAN, JR.,
135 South LaSalle Street,
Chicago, Illinois.

SIDLEY, MCPHERSON, AUSTIN & BURGESS
11 South LaSalle Street,
Chicago, Illinois.

F. W. MIELKE,
MCCUTCHEN, OLNEY, MANNON & GREENE,
1500 Balfour Building,
San Francisco, California.
Of Counsel.

Dated at San Francisco, California, November 6, 1939.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Subject Index

APPENDIX

Table of Authorities Cited

Cases

ANNUAL REPORTS OF INTERSTATE COMMERCE COMMISSION TO CONGRESS

STATUTES

In the Supreme Court of the United States.

OCTOBER TERM, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION, a corporation,
Petitioner,

vs.

EL DORADO TERMINAL COMPANY, a corporation,
Respondent.

Brief of General American Tank Car Corporation, Petitioner

This cause is here on writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered on March 17, 1939, in a cause numbered and entitled on its docket No. 8799, *El Dorado Terminal Company, a corporation, Appellant, v. General American Tank Car Corporation, a corporation, Appellee,* reversing a judgment of the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW

Opinions of the Circuit Court of Appeals:

104 Federal (2d) 903 (R. 304-339);

104 Federal (2d) 916 (Denying Rehearing, R. 341-348.)

No opinion was rendered by the District Court. Its findings of fact, conclusions of law and judgment are in the record (R. 29-37).

JURISDICTION

1. The judgment of the Circuit Court of Appeals was entered on March 17, 1939. Petition for rehearing was seasonably filed and was denied on May 19, 1939.

2. The petition for writ of certiorari was filed in this Court on June 22, 1939. The order granting certiorari was entered on October 9, 1939.

3. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. §347).

STATEMENT OF THE CASE

(1) The Essential Issue.

A single issue of federal law, arising under the Elkins Act, is presented in this cause, although certain subordinate issues, neither presented nor considered in the District Court, were raised for the first time in the opinions

of the Circuit Court of Appeals.[1] The essential question involved is whether a shipper, to whom railroad freight cars were leased by a car owning company, may, without violating the Elkins Act, recover from the car owner pursuant to the lease the full amount of the payments received by the car owner from the rail carriers for the use of the leased cars in interstate commerce when it appears that such payments exceed the amount of the shipper's car rental. Specifically the question is whether by such payment the shipper will secure the transportation of its property at a less rate than that named in the published freight tariffs. The Elkins Act provides

> "That * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs * * * or whereby any other advantage is given or discrimination is practised." (32 Stat. 847, 34 Stat. 587-588; 49 U.S.C. §41 (1); Appendix, p. i.)

The material facts appear without controversy. In large measure they were set forth in a written stipulation (R. 45 et seq.).

---

(1) The parties were agreed, in the trial of the case in the District Court as well as in the presentation to the Circuit Court, that but a single issue of law is involved, as is more fully shown upon page 67 of this brief.

(2) Nature of Suit.

The cause arises out of a suit at law brought by respondent, El Dorado Terminal Company,[1] lessee of certain railroad tank cars from petitioner, General American Tank Car Corporation,[2] the owner and lessor of such cars, to recover from the Car Corporation pursuant to the lease certain moneys hereinafter styled "car mileage" received by the Car Corporation from the rail carriers as compensation for the use of the cars in the transportation of property of the El Dorado Company in interstate commerce. The moneys sought to be recovered by the El Dorado Company constitute the excess of the "car mileage", so received by the Car Corporation from the rail carriers, above the amount of the car rental payable by the El Dorado Company for the leased cars. The defense was that the payment of such excess would violate the Elkins Act, in that thereby the El Dorado Company would indirectly secure the transportation of its property at less than the published freight rates. The judgment of the Circuit Court of Appeals would require the Car Corporation to pay over to the El Dorado Company the excess of the car mileage above the car rental.

(3) Car-Leasing Agreement Involved; Performance Thereunder.

Prior to the decision of the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, 20 I.

---

(1) Respondent, El Dorado Terminal Company, is a wholly controlled subsidiary of its assignor, El Dorado Oil Works. For convenience respondent and its assignor are each, without distinction, referred to hereinafter as the "El Dorado Company".

(2) Referred to hereinafter as the "Car Corporation".

I. C. C. 323 (July 2, 1934), hereinafter reviewed, the Car Corporation had entered into a written agreement (September 28, 1933) with the El Dorado Company whereby it agreed for a term of three years commencing on January 1, 1934, to lease to the El Dorado Company certain tank cars for the shipment of the latter's products at a specified monthly rental for each car so leased (R. 20-28).[1] The specified rental was $27.50 per car per month for fifty cars styled "Permanent Cars", and $30.00 per car per month for such additional cars as the El Dorado Company might require (R. 23). It was further agreed that the Car Corporation would collect from the rail carriers over whose lines of railway such cars would pass, the car mileage payments made by the rail carriers as compensation for the use of such cars in railroad service, and would credit the payments so collected to the car rental or service account of the El Dorado Company (R. 26).

Throughout a period of approximately six months extending from January 1, 1934, to June 30, 1934, inclusive, it was the practice of the Car Corporation in the performance of its contract to credit the car rental account of the El Dorado Company with the full amount of the car mileage payments received by the Car Corporation from the rail carriers, even though they exceeded the car rental, and to pay over the excess monthly to the El Dorado

(1) The agreement provided that "No title or leasehold or property interest of any kind in said cars, or any of them shall vest in the second party or its successors or assigns under the terms and provisions of this service contract, or by reason of the delivery of possession of cars to the second party or its use thereof hereunder." (R. 27-28.)

Company (R. 47-48). This practice was continued until the publication of the decision of the Interstate Commerce Commission on July 2, 1934, in

Use of Privately Owned Refrigerator Cars, supra, (R. 49)

whereupon the Car Corporation felt compelled to modify the practice.

In this decision the Commission declared that the payment to shippers of mileage earnings, "either direct or through car owners", in excess of the amount of car rental and other actual expenses incurred by the shippers, is in violation of the Elkins Act. The findings of the Commission were confined to practices in connection with the use of privately owned refrigerator cars, since the investigation itself was thus limited. But the Commission pointedly observed:

> "The discussion herein has been confined almost entirely to refrigerator cars, and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars." (R. 159.)

Pursuant to this decision condemning practices of this character as violative of the Elkins Act, the Car Corporation, which theretofore had faithfully made the agreed payments, refused further to credit or pay over to the El Dorado Company the car mileage in excess of the car rental. Accordingly, commencing after the month of June, 1934, the Car Corporation credited the car mileage payments to the El Dorado Company in amounts equal to the car rental but made no payment of the excess. In an

agreed statement of facts signed by the parties and received in evidence at the trial (R. 45, 48), it was stipulated, *inter alia*, that the Car Corporation's refusal to pay over this excess was based on its conclusion, upon advice of counsel, following the decision of the Commission referred to above, that such payment would be in violation of the Elkins Act.

The contract was not rescinded but the El Dorado Company elected to continue its use of the cars of the Car Corporation.

(4) The El Dorado Company Has Made No Payment by Way of Car Rental.

After this change in practice on the part of the Car Corporation, the El Dorado Company still paid no car rental in fact, since the rental was invariably offset by the crediting of car mileage in an equal amount (R. 172). At no time was the El Dorado Company required to make any payment by way of car rental (R. 177-178).

(5) Car Mileage Exceeded Shipper's Car Rental by Substantial Amounts.

The amounts by which the car mileage payments have exceeded the car rental are substantial. It is readily deducible from the ledger sheets reflecting the entire car rental account between the parties covering the period involved in the suit (plaintiff's Exhibit No. 1, R. 182, 183-187) that during the period of seventeen months extending from January, 1934, to May, 1935, both inclusive, the El Dorado Company's car rental amounted to $25,651.26. It is shown by the record stipulation (R. 45, 46)

that the car mileage paid by the rail carriers on the leased cars for the same period aggregated $51,403.58. The car mileage earned by the cars was therefore approximately twice the car rental. We present the figures in tabular form:

Aggregate car mileage for 17 months	$51,403.58
Aggregate car rental for 17 months	25,651.26
Excess of car mileage over car rental	$25,752.32[1]

This is the measure of the profit which would have been enjoyed by the shipper if the car mileage in its entirety had been credited to the shipper's account. Since the car rental provided by the contract was $27.50 to $30.00 per car per month (R. 23), and the car mileage was more than twice the rental, the excess of the car mileage payments over the car rental amounted on the average to approximately $27.50 per car per month. Thus when freight charges are paid to the rail carriers in some particular amount for the transportation of the products of the El Dorado Company, such freight charges would be reduced to the extent of approximately $27.50 per car per month.

(6) Under the Railroad Tariffs the Car Mileage Was Not Payable to the El Dorado Company.

Throughout the first fifteen months of the period covered by the suit the applicable rules of the car mileage

(1) This figure exceeds the amount sued for—i.e., $18,532.78—for the reason that prior to June, 1934, the Car Corporation credited the entire car mileage to the El Dorado Company.

tariffs[1] provided that the car mileage allowances would be paid to the car owner or to the party who had acquired the cars as shown by the "reporting marks" (R. 192-197). The "reporting marks" borne by the leased cars were not those of the El Dorado Company, but were those of the Car Corporation, the owner, in conformity with the requirements of the contract (R. 21). Moreover, commencing with April 1, 1935, and therefore effective during the last two months of the period in suit, the tariff rules contained a restrictive clause forbidding payment to a lessee such as the El Dorado Company. The clause reads:

> "Mileage for the use of cars of private ownership will be paid for loaded and empty movements *only to the car owner—not to a lessee* * * * ". (R. 197.) (Emphasis supplied.)

(7) Cars Used Almost Wholly in Interstate Commerce.

The cars leased by the Car Corporation to the El Dorado Company were used in the transportation of the latter's shipments over the lines of common carriers by rail subject to the Elkins Act. Ninety-nine per cent or more of the shipments were interstate in character (Stipulation, R. 47).

---

(1) Doubtless it is understood that the car mileage allowances are published in tariffs which are distinct from the conventional freight rate tariffs. The former set forth the allowances which will be paid by the carriers for the use of privately owned cars, together with the rules governing payment. The latter set forth the rates which will be assessed by the carriers for the transportation of the shipper's property.

(8) Proceedings in Courts Below.

The El Dorado Company brought suit seeking the recovery of the balance of the car mileage payments which had been received by the Car Corporation, that is, the excess above the car rental, amounting to $18,532.78. In defense, the Car Corporation pleaded that it was prohibited by law, and particularly by the Elkins Act, from paying over such excess car mileage revenue to the El Dorado Company, in that the El Dorado Company thereby

> "would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act." (R. 18.)

A jury was waived (R. 29). The District Court sustained the Car Corporation's plea in defense. The court concluded, *inter alia:*

> "That, if defendant were to credit or to pay over to plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said tank cars, in excess of the car hire or rental reserved in said agreement, such credit or payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act." (R. 29, 35.)

Judgment was given accordingly for the Car Corporation (R. 36-37).

Upon appeal, the Circuit Court of Appeals reversed the judgment of the District Court, holding that the balance of the car mileage payments should be paid over to the El Dorado Company (R. 339, 340).

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred

1. In failing to hold that the owner of railroad freight cars leased to a shipper for the transportation of the latter's property in interstate commerce by railroad is prohibited by law, and particularly by the provisions of the Elkins Act, from paying over to the shipper any part of the car mileage payments received by the car owner from the rail carriers as compensation for the use of such cars in excess of the shipper's car rental and other costs, if any, in that thereby the shipper would obtain a rebate or concession and an advantage or discrimination in respect to its shipments, in violation of the provisions of said Act.

(a) In holding that a "profit" obtained by a shipper-lessee of privately owned cars, represented by the excess of the car mileage payments made by the rail carriers over the costs incurred by the shipper-lessee in obtaining and using the cars, does not constitute a rebate prohibited by the Elkins Act.

(b) In holding that under the applicable provisions of the car mileage tariffs of the rail carriers the car mileage allowances made by the rail carriers for the use of the leased cars were payable to the shipper-lessee.

(c) In holding that a car owner, "as agent," is legally obligated to pay over to its principal, the shipper-lessee, and that the latter may lawfully receive the full amount of the car mileage payments made by the rail carriers to the car owner, even though a "profit" is thereby realized by the shipper lessee.

2. In holding that the car owner, defending its refusal to pay over to a shipper-lessee the excess of the car mileage payments received from the rail carriers above the amount of the shipper's car rental upon the ground that the payment of such excess would violate the Elkins Act, was required to plead and prove that such shipper had incurred no expense in addition to the car rental in connection with the use of the leased cars, and failed to sustain that burden.

3. In failing to hold that the full performance of the contractual undertaking would produce results offending against the terms and purpose of the Elkins Act, and that for that reason the enforcement of the contract must yield to the enforcement of the Act.

SUMMARY OF ARGUMENT

1. When the full performance of a contractual undertaking would produce results offending against the terms and purpose of the Elkins Act, the enforcement of the contract must yield to the enforcement of the Act.

2. A car owning company is precluded by the Elkins Act from paying over to a shipper-lessee, and the latter

is prohibited from receiving, car mileage payments, received by the car owning company from the rail carriers for the use of leased cars in interstate commerce, in amounts exceeding the car rental and other costs, if any, of such shipper-lessee, in that thereby the shipper-lessee would obtain a rebate or concession in respect to its shipments.

(a) A "profit" obtained by a shipper-lessee of privately owned cars, represented by the excess of the car mileage payments made by the rail carriers over the costs incurred by the shipper-lessee in obtaining and using the cars, constitutes a rebate prohibited by the Elkins Act.

(b) Under the applicable provisions of the car mileage tariffs of the rail carriers the car mileage allowances made by the rail carriers for the use of the leased cars were not payable to the shipper-lessee.

(c) A car owning company, "as agent," is not legally permitted to pay over to a shipper-lessee, as principal, and the latter may not lawfully receive, the full amount of the car mileage payments made by the rail carriers to the car owner, when a "profit" is thereby realized by the shipper-lessee.

3. The car owning company, defending its refusal to pay over to a shipper-lessee the excess of the car mileage payments received from the rail carriers above the amount of the shipper's car rental upon the ground that the payment of such excess would violate the Elkins Act, was not required to plead and prove that such shipper had in-

curred no expense in addition to the car rental in connection with the use of the leased cars. The burden was in any event sustained.

ARGUMENT

I.

WHEN THE PERFORMANCE OF A CONTRACTUAL UNDERTAKING IS FOUND TO BE IN CONFLICT WITH THE ELKINS ACT, THE ENFORCEMENT OF THE CONTRACT MUST YIELD TO THE ENFORCEMENT OF THE ACT.

It is elementary that a contractual obligation will not be enforced by the courts if thereby the law would be violated. This Court has said:

> "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this Court."
>
> *Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U. S. 372, 375.

This Court has also said:

> "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter."
>
> *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357.

This generic principle is well established and its application is thoroughly understood. It has been made particu-

larly clear by this Court that when the provisions of a contract offend against the terms and purpose of the Elkins Act the enforcement of the contract should be enjoined.

United States v. Union Stockyard & Transit Co. 226 U. S. 286, 309.

(See also *New York, New Haven & Hartford R. R. v. I. C. C.*, 200 U. S. 361, 402; *Armour Packing Co. v. U. S.*, 209 U. S. 56, 81-82; *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, 474.)

Stripped of nonessentials, the case for the El Dorado Company comes to this:

> The El Dorado Company made a contract with a car owning company whereby certain cars were to be leased to it at a stipulated rental and wherein it was provided that the car mileage payments received by the car owning company from the rail carriers would be credited to the El Dorado Company's rental account. The mileage payments received by the car owning company from the rail carriers exceed the compensation payable from the El Dorado Company to the car owning company by substantial amounts. Admonished by a decision of the Commission pointing to the requirements of the Elkins Act, the car owning company has changed its practice under the contract so as to credit the El Dorado Company with car mileage equal to its car rental and no more. Payment of the excess car mileage earnings is none the less demanded by the El Dorado Company.

The material facts of the El Dorado Company's case are largely comparable with the facts revealed by the Commission's report in *Use of Privately Owned Refrigerator Cars, supra,* and expressed in part by the following excerpts from its report:

> "The leases usually call for the payment of stated amounts per month and the mileage earnings are either paid directly *to the shippers or to the lessors. In the latter cases the lessors deduct the amounts due the car companies under the contracts and remit the remainders to the shippers.* The contract price is usually fixed sufficiently low so that *the mileage earnings will exceed the cost to shippers.* It is true that, when the cars are leased, the lessees and car companies do not know definitely what the future mileage earnings of the lessees will be but the evidence is convincing that the inducement actuating the shippers and held out by the car companies is that, if only sufficient cars to take care of assured needs are leased, profits may confidently be expected. While the amounts of the profits are indefinite it is a practical certainty that there will be some. Were this not true there would be no advantage in leasing cars over obtaining them on assignment." (R. 157.)[1]
>
> * * * * * * * *
>
> "*The competition is keen, resulting in the cutting of rentals and intensive solicitation of shippers.* The most fertile field is shippers who have a fairly regular volume of traffic the year round, such as dealers in dairy products, canned goods, and candy. By leasing or renting only enough cars to take care of their

(1) Emphasis appearing in this brief is supplied unless otherwise indicated.

assured traffic, leaving the carriers to furnish cars to move the remainder, they are able to keep their cars moving most of the time, and *the mileage earnings usually exceed the compensation paid the car owners by substantial amounts.*" (R. 60.)

We find no distinction of substance between the practice which the El Dorado Company seeks to have approved and the practice which the Commission condemned as violative of the Elkins Act. The El Dorado Company is not content with the crediting of car mileage in a sufficient amount to offset its car rental. It is not satisfied merely to be relieved of the payment of all car rental. It seeks the car mileage earnings in their entirety, even though they exceed the car rental "by substantial amounts." It argues that, irrespective of the amount of its resulting "profit", it may claim that profit in reliance upon its contract. That profit, as we have indicated, would amount approximately to $27.50 per car per month.

The El Dorado Company has suggested, in its brief in reply to the petition for certiorari (p. 24), that the Car Corporation is merely seeking to escape its contract obligations to respondent to pay over the mileage earnings. The suggestion comes hardly in good part in view of the written stipulation of the parties (R. 45, 47-48) showing that the Car Corporation faithfully paid over the excess of the car mileage earnings over the car rental until it concluded, upon the advice of counsel given upon the decision of the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars, supra*, that continuation of the practice would be unlawful. After this change in practice on the part of the Car Corporation, the El

Dorado Company did not rescind the contract, but elected to continue its use of the leased cars. It still paid no rental in fact on the cars so used.

The El Dorado Company is without just grievance so long as it is credited with car mileage in an amount sufficient to offset its car rental. It is not out of pocket, although it is denied the profit which it would secure through the allowance of car mileage in full. The car owner properly receives the car mileage paid by the carriers, but it cannot rightly pay over to a shipper-lessee more than that which will suffice to offset the shipper's car rental and other costs, if any be shown.[1] In withholding the excess the car owner does no more than pursue the course of action under the contract which will avoid conflict with law.

No alternative course was open to the Car Corporation, unless it were willing to disregard the Commission's ruling as to the requirements of the Elkins Act and confront the consequences of its defiance. One private car owning company disregarded the admonitions of the Commission and was indicted for violation of the Elkins Act by reason of an arrangement whereby a shipper-lessee received car mileage in excess of its car rental.

U. S. v. North Western Refrigerator Line Co., U. S. D. C. Northern Dist. of Ill., No. 29046; indictment returned June 13, 1935.[2]

---

(1) The record in this cause contains neither proof nor claim of costs other than car rental sustained by the El Dorado Company in the use of the leased cars. See discussion *infra*, pp. 58 et seq.

(2) This is the indictment referred to in the opinion of the Circuit Court of Appeals (R. 326).

While the Car Corporation is not a common carrier nor subject to regulation as such, it is not for that reason immune to the law. Its function is to furnish cars for use in transportation service. The law permits the employment of privately owned equipment in railroad service but jealously guards such use to the end that means shall not be afforded by which the prohibitions against rebating and discrimination in any form may be set at naught. The term "transportation" is defined in paragraph (3) of Section 1 of the Act (24 Stat. 379. 41 Stat. 471-475; 49 U. S. C. §1 (3); Appendix p. ii) to include "cars, and other vehicles, * * * irrespective of ownership or of any contract, express or implied, for the use thereof * * *." This definition convincingly attests the determination of the lawmaking authority to prevent the use of the private car, irrespective of *"any contract"*, as an instrument of rebating, discrimination or preference.

The effect of the decision of the Circuit Court in the instant cause is to enforce a contractual undertaking on the part of a car owning company to a shipper-lessee notwithstanding that the shipper-lessee will thereby secure a "monetary profit" constituting a *pro tanto* abatement or remission of the published freight charges. The decision recognizes no limits upon the results that may be accomplished by contract between a car owning company and a shipper-lessee. The parties may bargain freely as to the disposition or division of the car mileage payments made by the rail carriers to the car owning company. Whatever the measure of profit, and however diverse the treatment meted out to different shippers, this decision would require performance in accordance with the strict letter of

each contract. Thereby the decision would reverse the rule of law which has heretofore prevailed, and would require the statute to yield to the contract.

II.

A CAR OWNING COMPANY IS PRECLUDED BY THE ELKINS ACT FROM PAYING OVER TO A SHIPPER-LESSEE, AND THE LATTER IS PROHIBITED FROM RECEIVING, CAR MILEAGE PAYMENTS, RECEIVED BY THE CAR OWNING COMPANY FROM THE RAIL CARRIERS FOR THE USE OF LEASED CARS IN INTERSTATE COMMERCE, IN AMOUNTS EXCEEDING THE CAR RENTAL AND OTHER COSTS, IF ANY, OF SUCH SHIPPER-LESSEE, IN THAT THEREBY THE SHIPPER-LESSEE WOULD OBTAIN A REBATE OR CONCESSION IN RESPECT TO ITS SHIPMENTS.

The District Court found and concluded that, if the Car Corporation were to pay over to the El Dorado Company the excess of the car mileage payments over the car rental, the El Dorado Company would secure the transportation of property at rates less than the rates named in the published and filed tariffs of the rail carriers, thereby obtaining a rebate or concession. The record admitted of no other result. The Circuit Court of Appeals should have so held.

A. The Shipper's "Profit" as a Rebate.

The holding of the Circuit Court of Appeals to which the petitioner's challenge is particularly directed is as follows:

> "(3) The Elkins Act makes it a criminal offense for the railways to pay less than their established

> mileage rates for the cars supplied by the El Dorado Company. The mileage rates properly are based upon averages which assume that certain shippers-suppliers having lower costs will make a profit. *Such profit does not constitute a rebate prohibited by the Act.*" (Opinion, R. 311)

This declaration is without precedent or counterpart in the history of common carrier regulation. It is hostile to ruling principles repeatedly announced and enforced. In its specific application to the use of privately owned cars, it is opposed to every other ruling within petitioner's knowledge. Never heretofore has it been held or implied that a shipper, by becoming a lessee of privately owned cars, may lawfully enjoy a "profit" represented by the excess of the car mileage revenue over the costs incurred by the shipper in obtaining and using the cars.

The court has erred in its premises as well as in its declaration of principle. The language employed by the court implies that failure to pay the car mileage to the El Dorado Company would be a tariff deviation and for that reason would violate the Elkins Act. Such is not the case. As shown on page 53 of this brief, failure of the rail carriers to pay the car mileage earnings to the El Dorado Company could not be "a criminal offense" under the Elkins Act, since under the provisions of the car mileage tariffs the mileage earnings were not payable to the El Dorado Company.

Moreover, the court has mistakenly understood that the car mileage rates are based upon average costs of "shipper-suppliers", including shipper-lessees, thereby leading

the court to conclude that such lessees are entitled to the entire car mileage allowances irrespective of any resulting "profit". The fact is that the car mileage rates are based *wholly* upon the costs of *car owners*, and in *no part* upon the costs of *lessees* of such cars. (*In the Matter of Private Cars*, 50 I. C. C. 652, 687.) The car mileage allowances are intended to reimburse car owners for the costs of ownership, comprehending, in addition to other costs, the expense of maintenance and repairs, taxes, depreciation and interest on investment. The car mileage rate is determined in relation to these elements. It is not intended to return a "profit" even to the car owner. This is shown by the following statement taken from the report of the Commission in *Matter of Private Cars, supra*, page 687:

> "It is conceded by car owners that they are not properly entitled to make a profit on their cars used by the carriers."

Since shipper-lessees have no investment in the leased cars, no part of the car mileage payments to them could represent return upon investment in the cars. This fact is specifically noted by the Commission in the following excerpt from its decision in *Use of Privately Owned Refrigerator Cars, supra*:

> "None of the shipper protestants who presented testimony own their private cars or have any capital investment in them. Most of those who lease or rent cars derive monetary profits from the mileage earnings and, thereby, obtain transportation at less than the published rates." (R. 145)

The court has gone so far as to declare that the Commission has recognized "that shippers leasing cars would have different rentals, one from another, and hence that the rental may be profitably less than the tariff" (R. 322). Plainly the court has misunderstood the Commission's views. The Commission has never recognized that "the rental may be profitably less than the tariff". On the contrary, the Commission has resolutely ruled that no arrangement may be lawfully made between a car owning company and a shipper-lessee whereby the latter is permitted to derive a profit from the use of privately owned cars.[1]

The statute does not provide, neither do the cases hold, that the carriers must pay to shipper-lessees the same allowances that are made to shipper-owners, regardless of the basic differences between the costs of the two groups and regardless also of the fact that thereby the shipper-lessees may be enabled to secure substantial profits out of the use of the leased cars (R. 317, 323, 324). The congressional intent, as evidenced by paragraph (13) of Section 15 of the Interstate Commerce Act (Appendix p. v), is to restrict the allowance to that which shall be "no more than is just and reasonable" and to empower the Commission

(1) Uniformly, throughout its existence, the Commission has held that an allowance which yields any substantial profit to the shipper is an unlawful rebate. (*Allowances to Elevators by Union Pacific R. R. Co.*, 12 I. C. C. 85, 89; *Manufacturers Ry. Co. v. St. Louis I. M. & S. Ry. Co.*, 28 I. C. C. 93, 101; *Chicago, West Pullman and So. R. R. Co. Case*, 37 I. C. C. 408, 414, 416; *Allowances to Texas Gulf Sulphur Co.*, 96 I. C. C. 371, 377; *Use of Privately Owned Refrigerator Cars, supra.*)

to determine "what is a reasonable charge as the maximum to be paid". The uniformity which the Elkins Act was designed to secure is uniformity in the *freight charges* paid by all shippers for the transportation of their property. (*Armour Packing Co. v. U. S.*, 209 U. S. 56, 80.) It is obvious that the purpose of the Act would be defeated if shipper-lessees having favorable arrangements with car owning companies were permitted to reap substantial "profits" in varying amounts from the car mileage allowances paid by the rail carriers and thereby to reduce their net transportation costs below the published freight charges.

The Circuit Court has assumed that the car mileage rate of 1½¢ per mile for tank cars, in effect during the period in suit, has been fixed or approved by the Commission (R. 323, 324). This does not appear from the record nor from any of the cited decisions. Apparently the court has misapprehended the decision of the Commission in *Paragon Refining Co. v. A. & S. R. R. Co.*, 118 I. C. C. 166 (R. 324). In that case the Commission merely required a switching carrier, which had no tariff providing for the compensation of car owners, to make an allowance to the complainant, a *shipper-owner*, which would be "the same as paid by the line-haul carriers" (p. 168). It did not go into the question as to the reasonableness of the allowance of 1½¢ per mile paid by the line-haul carriers. However, it is wholly irrelevant to the issue here presented whether the Commission has or has not fixed or approved the car mileage rates for tank cars. The question here is simply whether payment of the excess car mileage by the car

Corporation to the El Dorado Company would result in the reduction of the transportation charges of the El Dorado Company below the published freight rates.[1]

The court has cited the decision of the Interstate Commerce Commission in *Mileage Allowances on Refrigerator Cars* (1936) 218 I. C. C. 359 (R. 309, 316, 323). The court has failed to note, however, that the contemplated reduction there involved was in "the allowance paid to *car companies* on refrigerator cars" (p. 359). Neither shipper-owners nor shipper-lessees were involved. The report also discloses the fact that under the car mileage tariffs then in effect "the allowances for the use of *shipper-owned refrigerator cars not here involved*" were different from the allowances made to car owning companies (p. 360). Neither this case, nor the case of *U. S. Cast Iron Pipe & Foundry Co. v. Director General*, 57 I. C. C. 677, cited by the Circuit Court in the same connection (R. 316), affords any support for the statement of the court that uniformity of rate has often been determined by the Commission "by a computation of the average of the costs of many suppliers over a prior period of several years". The report of the Commission in the latter case shows that the allowances made by the carriers to the different industrial plants for switching service were not uniform but that they ranged from "47 cents to $2.89" per car and had

(1) The decision in *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, does not aid the argument of the Circuit Court. There is here *no issue* as to whether the car mileage rate is "just and reasonable", as the language of the Circuit Court would seem to imply. (R. 324.)

been determined individually in relation to the costs of the several industries (pp. 680, 681). In neither case did the Commission require uniformity in the allowance to all "suppliers".

Additional cases cited in the opinion of the Circuit Court (R. 323) are irrelevant to the immediate issue. None of them involved the fixing of car mileage allowances.[1] No decision of court or Commission has been cited, and we are satisfied that none can be cited, from which it is possible to draw as much as an inference that approval has been given to arrangements between shipper-lessees and car owning companies whereby the rental payable by the shipper-lessee "may be profitably less than the tariff".

It has been noted (p. 12 *supra*) that the Circuit Court of Appeals further held that the Car Corporation failed to prove that the El Dorado Company had incurred no costs, additional to rental, in the use of leased cars. That conclusion will be separately considered hereafter. But the ruling immediately criticized is without limit or qualification. It goes the full length of declaring that, irre-

---

(1) *Switching Rates in Chicago District*, 177 I. C. C. 669 (where the Commission prescribed switching rates to be charged by the carriers for their switching services in the Chicago District); *O'Keefe v. U. S.*, 240 U. S. 294 (where this Court upheld an order of the Commission fixing rate divisions to be accorded to certain tap-line railroads); *Sprout & Son v. U. S.*, 281 U. S. 249 (where this Court affirmed an order of the Commission requiring the equalization of line-haul rates for the transportation of domestic shipments and export shipments respectively, in order to remove undue prejudice).

spective of the shipper's costs and alike irrespective of the "profit" measured by the excess of the car mileage payments above costs, such "profit" rightly inures to the shipper as the legitimate fruit of his favorable lease. According to the court, it is not to be viewed as an indirect rebate or concession, in violation of the Elkins Act.

To be concrete, let it be assumed that the car rental payable by a shipper for the use of a private car is $30.00 but that the shipper is credited by the car owning company with car mileage paid by the rail carriers for the use of the car in the sum of $50.00. Upon the payment of the excess of $20.00 to the shipper he has enjoyed a net gain of profit in that amount. It should be entirely clear that this net gain of $20.00 is a *pro tanto* reduction of the freight charges paid to the carrier at the published tariff rates for the transportation of the shipper's property. The Circuit Court, however, holds that no reduction in freight charges is thereby accomplished.

The cases heretofore decided have reached results directly contrary to those reached by the Circuit Court in this cause.

(1) Use of Private Car as a Means of Rebating or Discrimination.

Throughout the greater part of its existence the Commission has been gravely concerned by reason of the persistence of rebating and discrimination in connection with the use of privately owned cars. The Commission's annual reports to Congress, commencing with its Third Annual Report for the year 1889, clearly disclose its continuing

concern with the private car problem.[1] In its annual report for 1893 the Commission dealt at length with "*Payment of Car Mileage for Use of Private Cars*" (pp. 60 et seq.) and referred to the "many discriminations" resulting from the practice (p. 66). In its annual report for the year 1903 the Commission again emphasized the "*Evils Resulting from the Use of Private Cars*" (p. 22 et seq.) Speaking particularly with respect to the use of stock cars, the Commission said, *inter alia*:

> "it is charged to have been the practice of the concerns owning such cars to divide with the shippers the mileage received from the railroad companies, *a practice which operated to the same effect as the payment of rebates to such shippers* * * *." (p. 24.)

The efforts of the Commission to eliminate improper practices in the use of privately owned cars culminated in a general investigation, nationwide in scope, instituted on the Commission's own motion on July 6, 1931. Part V of this investigation (Ex Parte No. 104) was directed specifically to "Private Freight Cars" (R. 55). For the purpose of hearing and investigation the proceeding was consolidated, so far as it related to refrigerator cars, with an Investigation and Suspension proceeding (Docket No. 3887) entitled "*Use of Privately Owned Refrigerator Cars*" (R. 49, 55). The extended hearings and investigations thereupon conducted by the Commission eventuated

---

(1) Third Annual Report for 1889, pp. 18, 108; Seventh Annual Report for 1893, pp. 60-67; Seventeenth Annual Report for 1903, pp. 22-26; Nineteenth Annual Report for 1905, pp. 10, 11; Twentieth Annual Report for 1906, p. 48.

in the report and decision which, as stated heretofore, brought about the change in practice on the part of the Car Corporation in the matter of the payment of car mileage.

The complete text of the Commission's report and order is in the record by stipulation of the parties (R. 48, 49-162). It is in the record not only for the Commission's conclusions as to the requirements of law, but also for the findings of fact which served as the foundation for those conclusions. The Commission's report contains a formidable assembly of facts, arising out of a variety of situations, revealing practices in the use of privately owned cars which are destructive of the integrity of the published freight rates and which produce discrimination and preference among shippers in varying degree. The report clearly discloses the evils which must inevitably arise if there is to be no restraint upon contractual undertakings between shippers and car owning companies in the use of privately owned cars. It is shown in particular that the car mileage allowances, received by the car owning companies from the rail carriers, afford a means by which undisclosed rebates may be extended and all manner of preference may be accomplished.

The following excerpts from the Commission's report exemplify the practices condemned by the Commission, as well as the objectionable consequences resulting from the payment of car mileage allowances to shippers in excess of car rental and any incidental expense:

> "The terms on which refrigerator cars are let to shippers vary. Some lessees pay a fixed monthly

rental, have their reporting marks on the cars, and the mileage earnings are paid directly to them. Some pay a fixed monthly rental, but the cars bear the reporting marks of the lessors, who collect the mileage earnings and in turn remit same to the lessees. Both forms of contract are hereinafter referred to as leases. Some shippers have cars assigned exclusively to their service that carry reporting marks of the owners. The mileage earnings are paid to such owners. If such earnings exceed a specified amount, the excess is paid to the shippers." (R. 59).

"Most of those who lease or rent cars *derive monetary profits from the mileage earnings and thereby obtain transportation at less than the published rates.*" (R. 145).

"A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, *whether privately owned* or railroad controlled, under terms *which place him in a more favorable position respecting the question of transportation than that prescribed by the published tariffs and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act.*" (R. 151).

"It cannot be denied that the net cost of the transportation to users of leased and rented cars is reduced by the amounts received in excess of the costs to them and that they are thereby removed from that *absolute level of equality* with other shippers which the statute was enacted to establish and that the purpose of the legislation is defeated." (R. 158).

"The conclusion is inescapable that the demand for the use of private cars by shippers is because of the profits flowing to them by the use of such cars. If such profits were denied to them, as we think they

must be, it is inconceivable to believe that shippers would continue to pay amounts ranging from $30 to $50 per car per month when they could demand that the carrier supply suitable cars without cost over and above the freight charges properly applicable to the shipments transported." (R. 159).

It is not practicable to review the Commission's evidentiary findings in detail, but we may briefly exemplify. (1) "The advantages claimed in using private cars are * * *" (inter alia) "profits derived from mileage paid by the carriers" (R. 74). (2) A particular shipper "pays $45 and $50 per car per month for its leased cars and receives mileage earnings of approximately $32.50 per car per month in excess thereof, a profit of $6,500 per month or $78,000 per year" (R. 79). (3) A shipper-lessee "refused to tell the amount it pays for the cars or to furnish a copy of its lease. The amount of profit it makes in mileage earnings cannot be determined" (R. 81). (4) A shipper leases cars "at a fixed amount per month which it refused to disclose. It admitted that the mileage earnings exceed the amount paid the car owners" (R. 84). (5) A shipper "learning that other shippers were making money out of private cars, secured a contract under which it was to receive all mileage earnings in excess of an agreed amount. The witness refused to state the amount, but acknowledged that in 1931 payments to it by the car company averaged $18.35 per car per month, and in 1932 were $21.27 per car per month" (R. 86). (6) "The majority of the shipper protestants who rent or lease cars and of the private-car lines heard herein refused to divulge the amounts paid to or retained by said car lines. The

shippers refused on the ground that they did not feel warranted in doing so without the consent of the car lines. The car lines refused on the ground that they could not afford to do so because of the keen competition between them" (R. 155-156). (7) A particular car line company leases and assigns cars to private shippers. "It is opposed to the practice, and claims it does so only in order to meet competition of other private and railroad-controlled car lines" (R. 125).

Such findings serve concretely to disclose the violations of the Elkins Act which must inevitably result if shipper-lessees and car owning companies may freely bargain as to the disposition of the car mileage payments received by the car owning companies from the rail carriers for the use of privately owned cars.

In its Summary and Conclusions the Commission said, *inter alia*:

> "We further find * * * that *the payment in whole or in part to shippers, including meat packers, of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates;* and that any allowance paid to the shipper-owner of private cars, including meat packers and their operating subsidiaries or agents, by the railroads as mileage earnings in excess of the ownership cost, including a fair return on the investment, are *unreasonable, unjustly discriminatory, and unlawful rebates and concessions.*" (R. 160).

The Commission said further:

> "The discussion herein has been confined almost entirely to refrigerator cars, and the findings will be so restricted, but *the general principles enunciated apply equally to all other types of private cars.*" (R. 159).

The Commission then admonished the carriers in the following terms:

> "We do not undertake to say that a carrier may not accept private cars if it so desires, but if such cars are accepted the carriers may not acquiesce in arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper lessee which results in the payment by such shipper of charges less than the published tariff rate." (R. 160-161.)

The significance and importance of the Commission's findings and conclusions are obvious.[1] Plainly the Car Corporation could not ignore these declarations except at the peril of prosecution for violation of the Elkins Act. It undertook to bring its practices into conformity with the requirements of law as declared by the Commission.

(2) Principles Apply To All Types of Private Cars.

The statement of the Commission that the principles set forth in its report are applicable to "all other types

---

(1) It is stated in the opinion of the Circuit Court of Appeals that "The Car Corporation relies on a statement of the Commission in the *Refrigerator Car* case * * *". (R. 327) This statement is inadequate. It has been made plain throughout that the Car Corporation relies upon all of the pertinent findings and conclusions of the Commission in that case.

of private cars" is dismissed by the Circuit Court of Appeals as "dictum" (R. 344). If such characterization is technically warranted, it has no justification in substance. A practice which is unlawful in relation to privately owned refrigerator cars must be equally unlawful in relation to privately owned stock cars, tank cars or cars of any other type. The requirements of the statute do not vary with differences in types of cars.

The Commission's statement, which the Circuit Court has cast aside, is a statement of that which should be obvious. It expresses a conclusion which the Commission is qualified to reach advisedly. As this Court has repeatedly indicated, the views of the experienced administrative body charged with the enforcement of the Elkins Act and related statutes are persuasive and worthy of respect.

The El Dorado Company has sought to distinguish tank cars from refrigerator cars by saying that the tariffs of the rail carriers "provided that the railroads would not furnish these tank cars for transportation purposes . . ." (Brief for Respondent in opposition to certiorari, p. 2). This characterization is inaccurate. The pertinent tariff item of the rail carriers is in these terms:

> "The rates provided for freight in tank cars do not obligate the carriers to furnish tank cars." (R. 201)

While the carriers thus do not "obligate" themselves to furnish tank cars, they do upon occasion supply tank cars to shippers for the transportation of vegetable oils as well as other products, as shown by the record in this case (R. 164-168).

The point in any event is completely irrelevant to the issue presented. As heretofore noted, the statute expressly provides that *all* cars "irrespective of ownership or of any contract, express or implied, for the use thereof" are subject to the provisions of the Act, alike with cars of railroad ownership. The fact that the carriers do not obligate themselves to supply tank cars cannot serve to justify the use of privately owned tank cars as instruments of rebating and discrimination.

The El Dorado Company has misconceived the nature of the Commission's action in the *Refrigerator Car* case and the Circuit Court has in turn been misled. The El Dorado Company says "The question considered and decided was as to the reasonableness of the allowance so paid on refrigerator cars * * *" (Brief for Respondent in opposition to certiorari, p. 10). This is error. The Commission made no decision as to the *reasonableness* of the mileage rates for the use of refrigerator cars, nor did it promulgate any "order, rule or regulation" controlling payment of these allowances, either as to refrigerator cars, tank cars or any other type of equipment. The Commission found the facts and then announced its conclusions, in most explicit terms, as to the requirements of law. The order actually entered (R. 161-162) merely required the cancellation of certain tariff items which had been suspended. This was without prejudice to the filing of amended tariff rules conforming with the Commission's suggestions (R. 159-160).

The Circuit Court has understood that the decision of the Commission "expressly excludes tank cars from its

regulation" (R. 329). This statement is misleading. It is true that no findings were made respecting tank cars, but this was for the reason that the evidence as to tank cars was not comprehensive enough to warrant conclusions as to abuses. But the Commission said:

> "That such abuses, however, did exist is indicated by the adoption of a code for tank-car service industry in which certain of the practices herein discussed, such as permitting the lessee of cars to profit through the payment of mileage earnings, is declared to be an unfair trade practice." (R. 139.)

The Commission made it exceedingly plain, as disclosed by its language previously quoted, that the principles which it enunciated "apply equally to all other types of private cars" (R. 159).

It should be clear that the practice which the Commission condemned did not become unlawful by virtue of any order of the Commission or even by virtue of the Commission's findings or conclusions. It was unlawful by virtue of the prohibitions of the Elkins Act, unaided by any order or expression of the Commission. While the Circuit Court suggests that "The reasoning supporting the order on refrigerator cars may or may not be applied in a hearing in which are developed facts concerning tank cars similar to those in that case" (R. 329), we think that a contrary inference is impelled. A practice which would violate the law in connection with the use of private refrigerator cars would be equally unlawful in connection with the use of private tank cars.

The Circuit Court concluded that the tank cars were supplied to the rail carriers by the El Dorado Company and that, for this reason, the Car Corporation could not withhold "the excess of the mileage collections over rentals" (R. 308). Even if the court's premise that the cars were supplied by the El Dorado Company were to be accepted, the conclusion does not follow that the "excess of the mileage collections over rentals" may lawfully be paid over to the shipper-lessee. It need only be noted again that all cars, irrespective of their ownership and irrespective of any contract for their use, are subject to the provisions of the law prohibiting rebates or other concessions. It should also be observed that in the *Refrigerator Car* case the Commission found that the car owning companies were leasing cars to shippers for their use. These shippers were supplying the leased refrigerator cars to the carriers in the same sense in which the El Dorado Company, according to the Circuit Court, has supplied the leased tank cars to the rail carriers. Yet the Commission ruled that the payment of the excess car mileage to the shipper-lessees would violate the Elkins Act. The two cases are fully in parallel. The error of the Circuit Court consists in its failure to recognize and apply the governing principle, viz., that the shipper is not permitted, by any means whatever, to obtain a payment which operates to reduce his transportation costs below the established freight charges.

The conclusions of the Circuit Court of Appeals are wholly irreconcilable with the conclusions of the Commission. In effect the court has overruled the Commission.

That the Commission is gravely concerned by reason of the decision of the Circuit Court is attested by the following statement in its Memorandum in support of the petition for certiorari in this cause (pp. 4-5):

> "Particularly important in the administration of the Interstate Commerce Act is the question of whether the receipt by the shipper of mileage allowances for leased cars in excess of the rental paid by the shipper for the cars constitutes an unlawful rebate or concession, or gives the shipper an advantage in respect to its shipments in violation of the Elkins Act."

If the decision is permitted to stand it will not only discredit the Commission's views but it may well nullify the Commission's efforts to put an end to rebating and discrimination in connection with the use of privately owned cars. Certainly it will produce that result with respect to privately owned tank cars since the holding is that shippers and car owners are free to contract as they please respecting the division of car mileage earnings and, whatever the measure of the shipper's "profit" and whatever the resulting inequalities among shippers, the law is not violated thereby.

(3) The Reichmann Case.

The case of

Interstate Commerce Commission v. Reichmann, 145 Fed. 235,

is particularly apposite. The decision of the United States Circuit Court in that case was cited and relied upon by the Commission in *Use of Privately Owned Refrigerator Cars*, *supra*. The case arose on an application by the Interstate

Commerce Commission to the United States Circuit Court for an order requiring the defendant Reichmann to answer a question propounded to him as a witness in a proceeding before the Commission dealing with practices in connection with the payment of car mileage earnings on privately owned livestock cars. Reichmann was vice-president of a car line company known as Street's Western Car Lines, a company owning some 9,000 cars in general use in the transportation of livestock over the lines of various railroads.

In the hearing before the Commission Reichmann was asked the following question: "What part of the mileage, or from whatever source, have you given up to shippers during the last six months?" Upon advice of counsel, he refused to answer. The Commission thereupon made an application to the United States Circuit Court for an order requiring the witness to answer the question. Whether the witness could be required to answer depended solely on whether the payment of the car mileage or any portion thereof to the shippers by the car owning company would result in violation of the Elkins Act. The court, after an exhaustive discussion of the law, held that by such payment the Act would be violated. An order was accordingly issued requiring Reichmann to answer the question propounded by the Commission.

Speaking with direct reference to the fact that the payment of any portion of the mileage earnings would result in a reduction of the freight tariff rates or the cost of transportation, the court said:

> "The purpose of the enactment of the statutes relating to interstate commerce was to give to all ship-

pers of property uniform treatment in the matter of transportation, and the Interstate Commerce Commission was created to secure the enforcement of those statutes. * * * The question then presented is, would the payment by the private car company, of a sum of money to a shipper *who had previously paid the railway company the regular rate*, place such shipper in a more favorable position respecting the question of transportation than that prescribed by the published tariff and occupied by shippers generally, and if so, has Congress prohibited a private car company from making such payment, and is such prohibition authorized by the federal Constitution. *That the person to whom the payment is made has been, thereby, removed from the level of equality, to establish which the laws were passed, is too plain to justify extended consideration.* With respect to the transportation of his property, he is just as much better off than the general run of shippers as the payment amounts to. *The net cost of the transaction to him—his freight expense—has been reduced just that much.* It, therefore, being apparent that in such a case the purpose of the legislation has been defeated, the inquiry is, 'has this defeat resulted from the violation of a valid statute of the United States?' " (p. 237).

* * * * * * *

"The records of the proceedings of the courts and of the Interstate Commerce Commission, during the years succeeding 1887, disclose the employment of a large variety of means to evade the law. *One of these was the use of the so-called private car;* that is, a car which did not belong to the railway company, but did belong either to the shipper himself or to a corporation which was neither carrier nor shipper, it

being generally understood that in the case of the shipper whose traffic went forward in his own car, *excessive payments were made to him on the alleged score of mileage, which, in effect, brought his transportation cost below the regular rates*, and in the case of the shipper whose goods were vehicled in cars belonging to a car company, *payments* of money, as commissions or otherwise, *were made to him by or through the medium of such private car company; the effect of which was to give him the service at a cost below the regular tariff.*" (p. 239).

The court pointed out that it was due to these various efforts to circumvent the law as it formerly stood that the Elkins Act was passed in 1903.

The decision in the *Reichmann* case has never been overruled. The opinion has found general acceptance as a correct exposition of the law.

(4) Principle Unaffected by 1906 and 1917 Amendments.

The Circuit Court of Appeals in the instant cause has concluded that the ruling in the *Reichmann* case is no longer applicable for the reason that the case was "decided in 1906, shortly before the Hepburn amendment and 11 years before the car service amendment of 1917 * * *" (R. 326).[1] The court has understood that these amend-

(1) The Hepburn Act amended paragraph 1 of Section 6 and added paragraph 13 to Section 15 of the Interstate Commerce Act; 34 Stat. pp. 586 and 590; 49 U. S. C. §6 (1) and §15 (13); Appendix, pp. iv, v. The 1917 amendment added paragraphs 10, 11, 13 and 14 to Section 1; 40 Stat. 101; 49 U. S. C. §1 (10) (11) (13) and (14); Appendix, pp. iii, iv.

ments served to confer upon shippers the "right" (R. 312, 316, 326) or "privilege" (R. 327) of supplying "car service" to their carriers. But the court is in error as to the effect of the amendments. It was entirely lawful, before either of these amendments was adopted, for the shippers to supply "car service" or services of various other kinds to the rail carriers, provided only that the allowances made by the carriers to the shippers should not be made in such fashion as to result either in rebating or discrimination.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247.

Moreover, the amendments did not operate to deprive the carriers of the right to furnish their own vehicles for the transportation of freight. Privately owned cars may be used only with the carrier's consent.

Atchison, Topeka & Santa Fe Ry. Co. v. U. S., 232 U. S. 199, 214, 215.

The purpose of the Hepburn amendment of 1906 was, first, to require the tariff publication of such allowances as the carriers might make to shippers and, second, to empower the Commission to fix the maximum amounts of such allowances. The Car Service Amendment of 1917 is not applicable to "shipper-suppliers" at all. It confers jurisdiction over practices in respect to car service "as between the carriers only".

Refrigerator Car Mileage Allowances, 232 I. C. C. 276, 278, 279.

Neither the 1906 nor the 1917 amendment served to legalize any practice which theretofore had been held to be

in violation of the Elkins Act. They merely implemented the Commission's authority. As pointed out by the Commission in *Matter of Private Cars*, 50 I. C. C. 652, 681, the Hepburn amendment of 1906 was specifically directed "*to the prevention of rebates by way of excessive allowances to shippers* * * *." It remained and still remains the law that a privately owned car may be used, with the carrier's consent, in interstate commerce, but it may not be used as a means of rebating, discrimination or preference.

The Circuit Court of Appeals seeks further to distinguish the *Reichmann* case on the ground that "Though purporting to construe the Elkins Act, it does not consider its second paragraph, making criminal a carrier's deviation from such tariffs, perhaps because no such car supplying tariff was in existence."[1] (R. 326-327.) The implication of these words is that the car mileage in the present case was payable to the El Dorado Company under the terms of the tariffs. This is erroneous. The car mileage was *not* payable to the El Dorado Company under the provisions of the carriers' published mileage tariffs, as is shown under "B" of this subdivision (pp. 51-53, *infra*). If the rail carriers had, in the present case, paid the car mileage to the El Dorado Company, they would have been guilty of a deviation from their tariffs. Obversely, there was no deviation from the tariffs when the carriers paid the car mileage to the Car Corporation.

In the *Reichmann* case and in *Use of Privately Owned Refrigerator Cars* there was presented essentially the

(1) The second paragraph of the Elkins Act is set out in the Appendix, p. ii.

same issue of law as that involved here. In both cases it was definitely held that the payment of car mileage earnings by car owning companies to shippers, *whereby shippers obtain transportation at a net cost less than the charges accruing under the freight rates applicable to the shipments,* is in violation of the Elkins Act.

(5) Rebates or Concessions Through Intervening Third Persons.

The prohibitions of the statute are not confined to transactions between carriers and shippers only. They are directed against "any person or corporation." They suffice to condemn any course of conduct on the part of a shipper and a third person, although in no wise identified with the rail carrier, whereby the shipper receives a rebate or concession. Such third person may be the owner of private cars, as in the instant case and alike in the *Reichmann* case now under review. This is made clear in the further excerpt from the opinion in the *Reichmann* case immediately to follow.

Continuing with its discussion of the terms and purpose of the statute, the court pointed out that the Act prohibits everybody, whether carrier or anyone else, from granting a concession, rebate or discrimination.

> "The offering, granting, or giving, or soliciting, accepting, or receiving, any such rebate, concession, or discrimination, is declared to be a misdemeanor punishable with a fine. While this enactment, in terms, prohibits any person, persons, or corporation, from giving any concession or discrimination in respect of the transportation of property by a common carrier, the respondent contends that the only effect of

the clause quoted is to prohibit the shipper from soliciting or accepting preferential treatment from the carrier, and the carrier and its agents from offering or giving it. *This contention means that, whereas, the universally conceded purpose of the law relating to interstate commerce is to put all shippers on an equality, the shipper is still perfectly free to accept money from other source than the carrier itself, and that any person or corporation other than the carrier is at liberty to make such payment. It is not and cannot be denied that the effect of such a transaction would be to absolutely disrupt uniformity.* Indeed the very purpose of the payment by the car company is to place the shipper in a position of preference, and thereby to induce him to require the carrier to furnish Street's cars for his future shipments, on which, presumably, he would receive like payments from the car company, thus securing to him a continuing financial advantage not contemplated by the regular tariff. Does the language bear this construction? Is it the deliberately expressed intention of Congress, in this legislation enacted to preserve the integrity of the published rate, that the rate may be varied *by some intervening or cooperating or subserving agency*, or is it the expressed intention that nobody may do what a carrier is forbidden to do? Let it be remembered that the carrier and its agents had already been required to adhere to the regular published rate, it having been specifically enacted, at the beginning of Section 1, that any offense committed by the carrier's agent, as provided by the original act, should be held to be a like offense committed by the carrier corporation. *Do the words 'it shall be unlawful for any person, persons, or corporation to offer, grant or give * * * any rebate, concession, or*

*discrimination * * *' prohibit a private car company from paying money to a shipper 'in respect of the transportation of his property' by a common carrier in cars belonging to the car company? Such payment is not merely 'in respect of such transportation,' but it is in consideration of such transportation. And that it would be a concession or discrimination which would operate to give the fortunate payee an advantage, by reducing his freight account below the regular rate, is obvious.*" (pp. 240 and 241).

The court fully considered and specifically rejected a contention similar to that persistently urged by respondent herein to the effect that the prohibitions of the Elkins Act are directed against rebates or concessions on the part of carriers only and that there can be no rebate or concession without participation or collusion on the part of a carrier. The court points out that the acceptance of such construction of the law would be "to absolutely disrupt uniformity." The clear holding is that no intervening third party may do what a carrier is forbidden to do.

(6) The Spencer Kellogg Case.

This point was also specifically ruled upon in the decision of the Circuit Court of Appeals for the Second Circuit in

Spencer Kellogg & Sons v. U. S., 20 Fed. (2d) 459, certiorari denied 275 U. S. 566.

This decision was also cited and relied upon by the Commission in *Privately Owned Refrigerator Cars* (R. 155). The Spencer Kellogg Company was a grain elevator concern and received an allowance of one cent per bushel

for grain elevation services rendered for a railroad company in connection with the transfer of grain from lake steamers to railroad cars at Buffalo, New York. The elevator company in turn paid shippers, indirectly through a broker, one-half cent per bushel on grain sent through its elevator. For this it was held guilty on an indictment for violation of the Elkins Act. The conviction was affirmed by the Circuit Court of Appeals and a petition for certiorari was denied by the Supreme Court.

The railroad company was not a party to this arrangement nor did it have any knowledge of the practice of the elevator company. The carrier's tariff published the allowance of one cent per bushel for the service performed by the elevator company, just as here the car mileage allowance is published in the carriers' tariffs. The analogy between the two cases is at once apparent, the only difference being that in the one case the violation of the Act arises in connection with car mileage allowances and in the other in connection with elevator service allowances.

Upon reference to Paragraph (3) of Section 1 of the Interstate Commerce Act, reproduced on page ii of the Appendix to this brief, it will be noted that "elevation, and transfer in transit" of property transported and the use of "cars, * * * irrespective of ownership" are included in the term "transportation" under the same provision of the Interstate Commerce Act. The plain intent of the statute is to require those who furnish either services or facilities for transportation to do so in subordination to the Act. In brief, a third person is not permitted to supply either a service or a facility in such fashion as to avoid the prohibition against rebating and discrimination.

The elevator company contended that the Elkins Act did not apply to it because *it was not a carrier.* Here the El Dorado Company has contended similarly that the Act does not apply to the Car Corporation because it is not a carrier. But in the *Spencer Kellogg* case the Circuit Court of Appeals held, as was held in the *Reichmann* case, that the Act applies to all persons or corporations, whether carriers, shippers or others. We quote the following pertinent excerpts from the opinion of the court:

> "The writ presents the question of whether a corporation, *other than a carrier* who acts in performing interstate transportation service, commits a breach of the laws referred to by giving such concessions and rebates.
>
> "The application of the statute *is not limited to shippers and carriers,* but includes and punishes *any person or corporation* whose intended acts result in the transportation of property at less rates than those mentioned in the tariffs lawfully published and filed by common carriers. *Nor is it essential to convict, within the terms of the statute, to prove that there was cooperation by a common carrier.* The result forbidden by the statute was accomplished by plaintiff in error's payments to consignees and shippers, and resulted in shippers receiving their transportation at rates less than those named in the tariffs.
>
> "* * * *Its broad and sweeping language* is a clear expression of the intendment of Congress to make the purposes of the act applicable to *any person* or corporation who might be in a position to commit an act which would accomplish the forbidden result, namely, the transportation of property at less rates than those named in the tariffs published by the car-

riers. *The penalty is inflicted for the purpose of punishing all those who do acts declared to be unlawful, and is directed to and includes the person or corporation whose acts result in the transportation of the property at less than tariff rates.*" (pp. 460 and 461).

* * * * * * *

"Congress intended to prohibit *all rebates, concessions, or discrimination with respect to railroad transportation service. This was not confined to the regulation of carriers and shippers.*" (p. 461).

* * * * * * *

"*The test* to be applied in determining whether the act is violated *is whether the terms of the statute include the acts committed. Whether the person committing the act is a shipper or carrier is not determinative.* United States v. Koenig Coal Co., 270 U. S. 512, 46 S. Ct. 392, 70 L. Ed. 709." (p. 461).

We should also note in passing that even if the Elkins Act were construed to be directed only against the carriers and shippers, it would still avail the respondent nothing because *the respondent, the El Dorado Company, is the shipper here.* It would not be exempt from the provisions of the statute even if the Car Corporation were exempt. The fact is that neither is exempt.

The Circuit Court of Appeals has attempted to distinguish the *Spencer Kellogg* case on the ground that there the shipper supplied no service to the carrier but received a rebate from "some third person supplying a facility in the interstate carriage" (R. 327). Similarly, respondent in its brief in opposition to the petition for certiorari (page 14) seeks to distinguish the *Reichmann* case upon the ground that there the privately owned

cars were rented to the rail carriers, whereas in the instant case they were leased to the shipper. The attempted distinction is wholly superficial. The substantial fact is that the practice condemned in both the *Spencer Kellogg* and the *Reichmann* cases was the arrangement whereby a shipper, receiving from an intervening third party a portion of the allowances paid to such party by the rail carriers, was enabled to secure a reduction in its transportation costs below the published freight charges. In substance the case here presented is identical since the shipper is demanding the payment of car mileage allowances, received by the car owning company from the rail carriers, in amounts exceeding the car rental payable by the shipper. Thus the shipper, as in each of the cited cases, would have its transportation costs reduced below the published freight charges. Whether the arrangement is effected through lease or contract, or without lease or contract, is wholly immaterial if the results forbidden by law are accomplished.[1]

---

(1) The Circuit Court refers to the decision of this Court in *I. C. C. v. Diffenbaugh*, 222 U. S. 42, 46. (Same case below *F. H. Peavey Co. v. Union Pacific RR. Co.*, 176 Fed. 409.) (R. 317.) That case goes no further than to hold that compensation by the rail carrier to one furnishing a transportation service (e.g., elevation of grain in transit) is not prohibited by the Elkins Act if the amount paid is neither unreasonable nor discriminatory and does not result in a rebate or other concession. The opinion shows that the published allowance "barely would pay the cost of the service rendered" (p. 47). Certainly the decision does not suggest that a grain elevator company is free to pay any part of the elevation allowance to a shipper with a resulting indirect remission of the shipper's transportation charges.

The decisions in the three cases just reviewed would seem to be determinative of the issue presented in the instant proceeding. The cases are in parallel with the present case in all essential features. In each instance an intermediary is the means through which a shipper obtains a payment which in effect reduces his transportation charges. A single governing principle is involved, and that principle is that a shipper is not permitted, through the action of an intervening third party furnishing a service or an instrument of transportation, or otherwise, by any device, to defeat tariff rates or to obtain a preference.

B. Circuit Court's Erroneous Understanding of Car Mileage Tariffs.

This suit was not brought to enforce the provisions of the rail carriers' car mileage tariffs. Rather it is a suit to recover upon a contract between a shipper and a car owning company. The plaintiff did not plead the car mileage tariffs as the source or basis of its claims. The complaint makes no reference to any tariff. The El Dorado Company's claims are based wholly upon contract. However, the Circuit Court was so misled by the contentions of the El Dorado Company that it rested its decision largely upon a mistaken understanding of the tariff provisions and their effect.

(1) Under the Applicable Tariff Items the Car Mileage was not Payable to the El Dorado Company.

In its initial opinion the court upheld the El Dorado Company's right of recovery primarily upon the ground that under the provisions of the applicable tariffs of the

rail carriers the car mileage allowances were payable to the El Dorado Company. The car mileage tariffs do not so provide. As we have pointed out in the Statement of the Case, throughout the first fifteen months of the period covered by the suit these tariff rules provided that the car mileage allowances would be paid to the car owner or to the party who had acquired the cars as shown by the "reporting marks" (R. 192-197).[1] The "reporting marks" borne by the leased cars were *not* those of the El Dorado Company, but were those of the Car Corporation (R. 21). Moreover, commencing with April 1, 1935, and therefore effective during the last two months of the period in suit, the tariff rules contained a restrictive clause explicitly forbidding payment to a lessee such as the El Dorado Company. The clause reads:

> "Mileage for the use of cars of private ownership will be paid for loaded and empty movements *only to the car owner—not to a lessee* * * *" (R. 197)

The meaning of the tariff provisions is not open to controversy. Plainly the tariffs did not provide for the payment of the car mileage to the El Dorado Company at any time during the period embraced by the suit.

These provisions of the car mileage tariffs are set forth in plaintiff's Exhibit No. 3 (R. 191-198) and are authenticated by stipulation of counsel as the applicable provisions of the carriers' tariffs (R. 191). In its assign-

(1) Effective after October 31, 1934, the tariff rules contained the additional requirement that the reporting marks must be those assigned by the American Railway Association and properly published in the Official Railway Equipment Register (R. 194 et seq.).

ment of errors the El Dorado Company again identified these rules as the "applicable published railroad tariffs" (R. 225, 235). Yet the Circuit Court of Appeals characterizes these tariff rules as merely "rules" of the American Railway Association (R. 347). The court has failed to understand that the "*Association* rules" are the *actual tariff rules* published and filed with the Commission in behalf of the rail carriers by "American Railway Association Tariff Bureau, B. T. Jones, Agent" (R. 192). The tariffs are identified as "Mileage Tariff No. 7-I, I. C. C. No. 2692", with numbered supplements (R. 192, 193 et seq.).

(2) Payments of Car Mileage to Car Corporation was in Compliance with Car Mileage Tariffs.

The Circuit Court has devoted a substantial portion of its opinion to the thesis that it would be a crime under the second paragraph of the Elkins Act (Appendix, p. ii), which makes it unlawful for "*any carrier*" to depart from its filed tariff rates, if the *rail carriers* were "to pay less than their established mileage rates for the cars supplied by the El Dorado Company" (R. 311, 323, 328). The error into which the court has fallen will be at once apparent when we again stress the facts:

First, that this suit is not brought against the *rail carriers;*

Second, that the suit is not brought upon the tariffs;

Third, that the mileage allowances were not payable to the El Dorado Company under the applicable tariffs.

There was no departure from the tariffs when the rail carriers paid the car mileage to the Car Corporation. But

there would have been a departure from these tariffs had the rail carriers paid the car mileage to the El Dorado Company.

In concluding that, under the applicable tariffs, the car mileage allowances were payable to the El Dorado Company, the Circuit Court of Appeals has in fact disregarded the provisions of these applicable tariffs specifically governing the payment of the car mileage allowances. The result is in conflict with decisions of this Court which have uniformly held that the rules contained in the published tariffs may not be disregarded or ignored. (*Davis v. Henderson*, 266 U. S. 92, 93; *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 637-638; *Davis v. Cornwell*, 264 U. S. 560, 562; *Erie R. R. Co. v. Stone*, 244 U. S. 332, 335-336; and see *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 50). This principle is exemplified by the following excerpt from the opinion in *Davis v. Henderson, supra:*

> "There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. *The rule was a part of the tariff.*" (266 U. S. at p. 93).

(3) In Disregard of Record Stipulation, Circuit Court has "assumed" Existence of Tariff providing for Payment of Car Mileage to El Dorado Company.

The error of the court in interpreting the tariffs and purporting to enforce them was drawn to its attention in the petition for rehearing. Thereupon the court declared, in its supplementary opinion, that "*we must assume* that

the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company" (R. 346). This was additional error. The assumption is directly contrary to the record stipulation to which we have referred (R. 191).

In its opinion upon petition for rehearing the Circuit Court further said:

> "Since there could be a crime committed under the Elkins Act only if there were no rate filed with or established by the Commission providing for the payment of compensation for the use of cars supplied by a lessee in the position of the El Dorado Company, the Car Corporation had the burden of proving that none was filed or established." (R. 345-346)

If such burden rested upon the Car Corporation, it fully sustained that burden by joining with the El Dorado Company in the record stipulation, just identified, specifically authenticating the tariff items shown of record as the applicable tariff items. Everything possible was done by petitioner and respondent to make it clear that the tariff provisions reproduced of record are the actual tariff provisions upon which the El Dorado Company has relied. Still the court failed to recognize that there was in fact no tariff providing for payment of the car mileage to the El Dorado Company.

In its supplementary opinion the Circuit Court has also criticized the answer of the Car Corporation because it "does not allege the *absence* of a tariff compensating the El Dorado Company" (R. 346). There was no occasion for any such allegation in the answer, since the complaint of the El Dorado Company tendered no case under the

railroad tariffs. The criticism is further unwarranted in view of the fact, heretofore repeatedly noted, that the parties *stipulated* the applicable tariff provisions, and did so in terms which precluded controversy or misunderstanding.

Plainly the Circuit Court has misunderstood the car mileage tariffs and has erred in resting its decision upon them.

C. Respondent's "Agency" Theory.

Counsel for the El Dorado Company evolved a theory of "agency" to implement the demand for payment of the car mileage revenue in full. The contention is that the Car Corporation made itself the "agent" for the collection of the car mileage revenue for its principal, the El Dorado Company, and hence that it must pay over the car mileage revenue in full to the El Dorado Company. This theory was adopted by the Circuit Court of Appeals (R. 304, 305, 306).

We think that agency relations were not created, but, if it is to be assumed that an agency did arise, it can contribute nothing to the case for the El Dorado Company. Manifestly, a principal can recover through his agent only that which is lawfully payable to the principal. In the preceding subdivision it has been shown that, under the provisions of the applicable car mileage tariffs, the car mileage revenue was not payable to the El Dorado Company.[1] Hence the El Dorado Company could not recover the revenue upon the theory of agency.

---

(1) Even if there had been color of tariff authority for the payment of the car mileage to the El Dorado Company—and we have shown that there was none—still

The argument is beside the point in any event. If it were possible to conceive of an agency agreement whereby a shipper is to obtain, through an intervening car owning company, payments from the rail carriers amounting to a partial remission of freight charges, the agreement would be unenforceable. It is obvious that, if the rule were otherwise, the statute could readily be circumvented by the convenient device of designating the car owning companies as the "Agents" through whom car mileage payments could be made to the shippers to defeat the published freight rates and the purposes of the Elkins Act. This was recognized by the Commission in *Use of Privately Owned Refrigerator Cars, supra,* since it condemned the payment of mileage earnings in excess of a shipper's costs whether such payments were made "direct or *through car owners*" (R. 160). In other words, the payment of the excess mileage earnings *through car owners,* whether designated as agents or otherwise, is objectionable because it results in a *pro tanto* reduction in the published freight rates.

The Elkins Act is a remedial statute which broadly comprehends all manner of arrangements, direct or indirect, whereby property is "transported at a less rate

---

the El Dorado Company could not prevail. This Court said in *Merchants Warehouse Co. v. U. S.,* 283 U. S. 501, 511:

> "Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form can not clothe it with immunity."

than that named in the tariffs published and filed by such carrier * * * or whereby any other advantage is given or discrimination is practiced." (*U. S. v. Koenig Coal Co.*, 270 U. S. 512, 518, 519).

The means employed is immaterial. The device need "not be necessarily fraudulent." Unlawful intent is not a necessary ingredient of the offense. (*Armour Packing Co. v. U. S.*, 209 U. S. 56, 71, 72.)

III.

THE CAR OWNER, DEFENDING ITS REFUSAL TO PAY OVER TO A SHIPPER-LESSEE THE EXCESS OF THE CAR MILEAGE PAYMENTS RECEIVED FROM THE RAIL CARRIERS ABOVE THE AMOUNT OF THE SHIPPER'S CAR RENTAL UPON THE GROUND THAT THE PAYMENT OF SUCH EXCESS WOULD VIOLATE THE ELKINS ACT, WAS NOT REQUIRED TO PLEAD AND PROVE THAT SUCH SHIPPER HAD INCURRED NO EXPENSE IN ADDITION TO THE CAR RENTAL IN CONNECTION WITH THE USE OF THE LEASED CARS. THE BURDEN WAS IN ANY EVENT SUSTAINED.

Although the point was neither raised nor presented either in the District Court or upon appeal, the Circuit Court of Appeals has held that the burden was upon the Car Corporation to prove that the El Dorado Company had incurred no expense, additional to the car rental, in connection with the use of the leased cars. It has further held that that burden was not discharged. (R. 308, 311.) In its opinion upon petition for rehearing the court has suggested, for the first time, that defendant's pleading

was inadequate in this regard. (R. 343-345.) Neither point was properly before the court for decision.

A. Theory of Decision at Variance with Theory Upon Which Case Was Tried and Decided.

(1) The El Dorado Company neither claimed nor proved any costs additional to its car rental.

(2) The Circuit Court has assumed facts not in evidence.

The record reveals no costs or expenses, other than car rental, incurred by the El Dorado Company in connection with the use of the cars. The entire account between the parties is in evidence as plaintiff's Exhibit No. 1 and shows no debits to the El Dorado Company other than car rental (R. 182, 183-187, inclusive). The stipulation as to facts is silent respecting any other costs or expense (R. 45). Neither in its proposed findings (R. 203-206, inclusive) nor in its assignment of errors (R. 225-286, inclusive) has the El Dorado Company advanced any claim that cost or expense in addition to the car rental was incurred. In fact, both parties presented the case in the District Court as well as in the Circuit Court of Appeals upon the basis that the car rental was the only cost to the El Dorado Company. The case was decided by the District Court upon that basis. Under well-settled principles the parties could not, and they did not, adopt a different theory of the case in the Circuit Court of Appeals. Neither party will be heard in an appellate court to question facts whose existence was assumed without objection in the trial court and on which assumption the trial court proceeded without objection in deciding the

case. (*U. S. v. Atkinson*, 297 U. S. 157, 159-160; *General Utilities Co. v. Helvering*, 296 U. S. 200, 206-207; *McCandless v. Furlaud*, 293 U. S. 67, 74; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 306; *Brown v. Gurney*, 201 U. S. 184, 190; *Panama City v. Federal Reserve Bank of Atlanta*, (C.C.A. 5th) 97 Fed. (2d) 499, 500; *Bovay v. Fuller* (C.C.A. 8th), 63 Fed. (2d) 280, 284; *Sacramento Suburban Fruit Lands Co. v. Melin*, (C.C.A. 9th) 36 Fed. (2d) 907, 909; *Arkansas Anthracite Coal & Land Co. v. Stokes* (C.C.A. 8th), 2 Fed. (2d) 511, 515.)

No issue as to additional costs, either actual or conjectural, was ever suggested until the Circuit Court of Appeals, upon its own initiative, raised it in its opinion (R. 308). The court, and not the El Dorado Company, tenders the suggestion that the monthly rentals did not establish the El Dorado Company's costs. The court, and not the El Dorado Company, argues that the Car Corporation had the burden of proof and failed to meet it. In support of its conclusion that the car rental did not establish the El Dorado Company's costs, the court offers a purely speculative analysis of costs and "possible liabilities" to which the El Dorado Company might have been subject (R. 310). None of these hypothetical costs has record support and in some important respects they are demonstrably contrary to fact.[1]

---

(1) For example: (a) The court assumes that the El Dorado Company "must provide trackage facilities" for the storage and switching of the cars (R. 310). This is without support in the contract or otherwise in the record. The Commission pointed out in *Use of Privately Owned Refrigerator Cars* that "Private cars, when held

If a party may not upon appeal change its theory of the case, it must logically follow that the Circuit Court of Appeals is not free to formulate a new theory of the case, and, in doing so, to assume a state of facts for which there is no support in the record. This must particularly be so where the court proceeds to assume facts which are at variance with what was presented to the trial court. The result is that the Circuit Court of Appeals has here reversed the trial court on a point not ruled upon or submitted for ruling, or even assigned as error. The District Court cannot be held guilty of error in a ruling which it

---

for loading, are stored on the tracks of the carriers * * *" (R. 150). (b) The court says that the El Dorado Company "has the current cost of their administration" (i.e., of the cars) (R. 310). If this is a reference to maintenance and repairs, it will suffice to point out that the Car Corporation is expressly obligated by the contract to maintain and repair the cars (R. 24-25). (c) The court states that the El Dorado Company "has the cost of cleaning the cars" (R. 310). The record does not so indicate. (d) The court says, contrary to the fact, that the cocoanut oil is "both inflammable and explosive and the contents may destroy the cars" (R. 310). (e) The court raises the possibility that the plant might suspend operation during the remainder of the lease so that the "rental costs for supplying the cars for 18 months may be the total 36 month obligation under the lease" (R. 311). Yet testimony given by an officer of the El Dorado Company at the trial, only two months before the expiration of the three-year lease, was to the effect that since the middle of 1934 the Car Corporation had continued to credit the El Dorado Company with a sufficient amount of the mileage earnings to offset all rental costs (R. 172).

A purely conjectural analysis of "possible" costs and liabilities of this variety, many of which are directly contrary to the record, is patently unwarranted.

never made nor had occasion to make (*Commercial National Bank v. Reber* (C.C.A. 3rd), 74 Fed. (2) 301, 302).

In *McCandless v. Furlaud, supra,* the Circuit Court of Appeals had reversed a judgment of the District Court on the ground that the plaintiff lacked legal capacity to sue. One of the assignments of error was directed to an alleged holding of the District Court that the plaintiff had such capacity but, as this Court observed,

> "* * * the record does not show that the District Court did so rule; or that it was requested to rule on the subject." (293 U. S. at p. 73.)

The judgment of the Circuit Court of Appeals was there reversed upon the ground that it had erred in reversing the decision of the trial court on a ground which had not been presented to that court. In the course of its opinion this Court said:

> "The reason for the rule is the broad one that a defect found lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court." (293 U. S. at p. 74.)

The error of the Circuit Court of Appeals in the present case is the more apparent, since the supposed defect of proof was not suggested by the El Dorado Company at any time, either in the District Court or before the Circuit Court of Appeals.

B. The Car Corporation's Burden of Proof Fully Discharged.

Although the El Dorado Company has at no time raised the issue of burden of proof as to additional costs, never-

theless the Car Corporation's burden of proof was fully sustained. The record shows that the car mileage earnings were more than double the car rental during the period in suit. The excess amounted to more than $25,000, or approximately $27.50 per car per month (Statement of the Case, *supra*, pp. 7-8). The Circuit Court suggests, however, that the excess already accrued might have been offset by the failure of the cars to earn any mileage during the last eighteen months of the three-year lease (R. 311). The suggestion is not only unwarranted; it is foreclosed by the evidence. Although the amount by which the car mileage earnings exceeded the car rental during the last eighteen months of the lease does not appear of record, the testimony of an officer of the El Dorado Company (R. 171-172) shows that after the middle of the year 1934 (when the Car Corporation ceased crediting the excess car mileage) the El Dorado Company "was credited thereafter with such proceeds of the mileage earnings as were equal to the rental or car hire reserved in the contract of September, 1933." The El Dorado Company has actually paid nothing by way of rental either since the summer of 1934 (R. 172) or prior thereto (R. 177-178). It thus appears that the El Dorado Company was credited with car mileage earnings in amounts sufficient to offset all rental costs throughout the entire period of the three-year lease up to the date of the trial, October 28, 1936 (R. 39), two months before the expiration of the lease. Such is the showing for 34 months out of the total contract period of 36 months.

Not only were the car mileage earnings shown to be more than double the car rental during the period in suit,

but it is shown in addition that the cost of maintenance and repair of the cars was borne by the Car Corporation and not by the El Dorado Company (R. 24-25, 177). The only reasonable inference that can be drawn from these facts is that the car mileage earnings were far in excess of the car rental and any other "actual expense" which might conceivably have been incurred by the El Dorado Company, and that the payment of this excess to the El Dorado Company would, therefore, accomplish an unlawful rebate.

The payment by a car owner to a shipper-lessee of car mileage earnings so greatly in excess of car rental cannot be justified upon the merely speculative assumption that the lessee might have incurred, or might in the future incur, additional costs equal to the amount of such earnings. Even in a criminal prosecution for unlawful rebating in violation of the Elkins Act, the government is not required to offer proof excluding possibilities of such a remote character. *(Vandalia R. Co. v. U. S.*, (C.C.A. 7th) 226 Fed. 713, 717; certiorari denied, 239 U. S. 642). Yet such is the burden which the views expressed in the opinion of the Circuit Court of Appeals would impose upon the Car Corporation.

If the views of the Circuit Court as to the burden of proof should prevail, a fertile field would be provided for collusion between shippers and car owning companies toward the covert accomplishment of the results forbidden by law. The car owning companies could safely credit favored shippers with the full car mileage payments received from the rail carriers, no matter how greatly they exceeded the car rental, confident that any charge

of rebating could be met with the plea that there was nothing to show that the shipper might not have incurred additional costs sufficient to offset the excess of the car mileage payments. Thus the efforts of the Commission to put an end to rebating and discrimination through the use of privately owned cars would be effectually frustrated.

A concept as to burden of proof which would permit such results is contrary to fundamental principles of the law of evidence. It is obvious that if the El Dorado Company had incurred any costs or expense additional to car rental the facts would have been within its knowledge. They could not have been within the knowledge of the Car Corporation. In such a case, where there is proof of circumstances tending to support the contention of the party having the burden of proof, the other party, who is in a position to offer evidence of all the facts and circumstances as they existed, must produce such evidence. If he fails to do so, his silence must be taken against him and it must be concluded that the facts do not support his cause. (*Selma, Rome & Dalton R. R. Co. v. U. S.*, 139 U. S. 560, 567-568; *Graves v. U. S.*, 150 U. S. 118, 120-121; *Ruakle v. Burnham*, 153 U. S. 216, 225; *U. S. v. Denver & R. G. R. R. Co.*, 191 U. S. 84, 91-93; *Henderson v. Richardson Co.*, (C. C. A. 4th) 25 Fed. (2d) 225, 228; *American Lead Pencil Co. v. Gottlieb & Sons*, 181 Fed. 178, 181; *Kyle v. Wadley*, 24 F. Supp. 884, 886; *Merriam v. Venida Blouse Corp.*, 23 F. Supp. 659, 660-661.) Since the El Dorado Company offered neither claim nor proof of any additional costs, the Circuit Court of Appeals erred in concluding that the Car Corporation failed to sustain its burden of proof.

C. Defense Adequately Pleaded.

The answer of the Car Corporation raised a legal defense to the cause of action asserted by the El Dorado Company. It averred that if it should pay over to respondent El Dorado Company "any part of the mileage payments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agreement, such credit and payment would be unlawful *in that* * * * (the El Dorado Company) * * * *would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation*,[1] thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act" (R. 18). Thus it pleaded the ultimate fact. The plea satisfied principle and precedent alike. It served fully to acquaint the adversary and the court with the nature of the defense relied upon.

At no time, in either the District Court or in the Circuit Court of Appeals, was the adequacy of the plea challenged by the respondent El Dorado Company. It was fully understood that the Car Corporation was contending that, by the payment to respondent El Dorado Company of any part of the excess car mileage earnings which had been withheld by the Car Corporation, the El Dorado

(1) While the Circuit Court of Appeals in its opinion upon petition for rehearing sets forth a part of the Car Corporation's plea, it has omitted that portion which is italicized above (R. 344).

Company would secure the transportation of its property at less than the tariff rates.

In respondent El Dorado Company's opening brief filed with the Circuit Court of Appeals it was stated (p. 10):

> "The sole question at issue is whether appellee was prohibited by the cited provisions of the Elkins Act from making the said payments according to the terms of its said contract—that is to say, whether such payments, if made, would amount to a rebate, a concession, an advantage or a discrimination prohibited by the cited provisions of the Elkins Act. (R. 43, 44.)"

Again, upon page 12 of the same brief for respondent, it was stated that

> "The sole question involved is directly raised by the pleadings."

In his opening argument before the Circuit Court of Appeals counsel for the El Dorado Company stated (Tr. of Oral Argument, p. 5):

> "Now, the whole question, therefore, hinges upon whether or not the payment contracted to be made by the tank car company is a violation of the provisions of the Elkins Act. *It is raised first, on the face of the answer and, second, on the face of the record.* The court held that it was."

Upon its own initiative the Circuit Court of Appeals has questioned the adequacy of the plea, and has done so only in its opinion upon petition for rehearing (R. 344). Even if the court could properly initiate this point, it is plain that the plea was adequate. This Court has held that even in an indictment under the Elkins Act it is suf-

ficient to plead the offense in the language of the statute and that such pleading is good, at least in the absence of demurrer (*Armour Packing Co. v. U. S.*, 209 U. S. 56, 83-84; and see *U. S. v. Chicago St. P. and O. Ry Co.*, 151 Fed. 84, 86, aff'd. 162 Fed. 835, cert. den. 212 U. S. 579; *Vandalia R. Co. v. U. S., supra*, 226 Fed. at p. 716).

The plea of the Car Corporation and, alike, the conclusions of the District Court, properly set forth the ultimate fact that payment to the respondent El Dorado Company of the excess of the car mileage earnings over rental would result in the latter's receiving transportation at less than tariff rates (R. 18, 35). Nothing more was needed. It is now too late in any event to raise any question as to the form of the findings and conclusions (*O'Reilly v. Campbell*, 116 U. S. 418, 421).

CONCLUSION

The decision under review is opposed to precedent and principle alike. It is irreconcilable with decisions in all other cases arising under cognate circumstances. It fails to conform with the generic rule repeatedly announced by this Court that when the full performance of a contractual obligation will produce results in conflict with a governing statute the contract must yield to the statute. In relation particularly to the Elkins Act, it announces a doctrine which is discordant with the consensus of judicial expression throughout the history of this law.

If this decision should stand as an authoritative statement of the law, it would accord judicial sanction to the

use of privately owned cars as a means by which shippers may avoid the prohibitions of the Elkins Act against rebates, concessions, preference and discrimination.

It is submitted that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

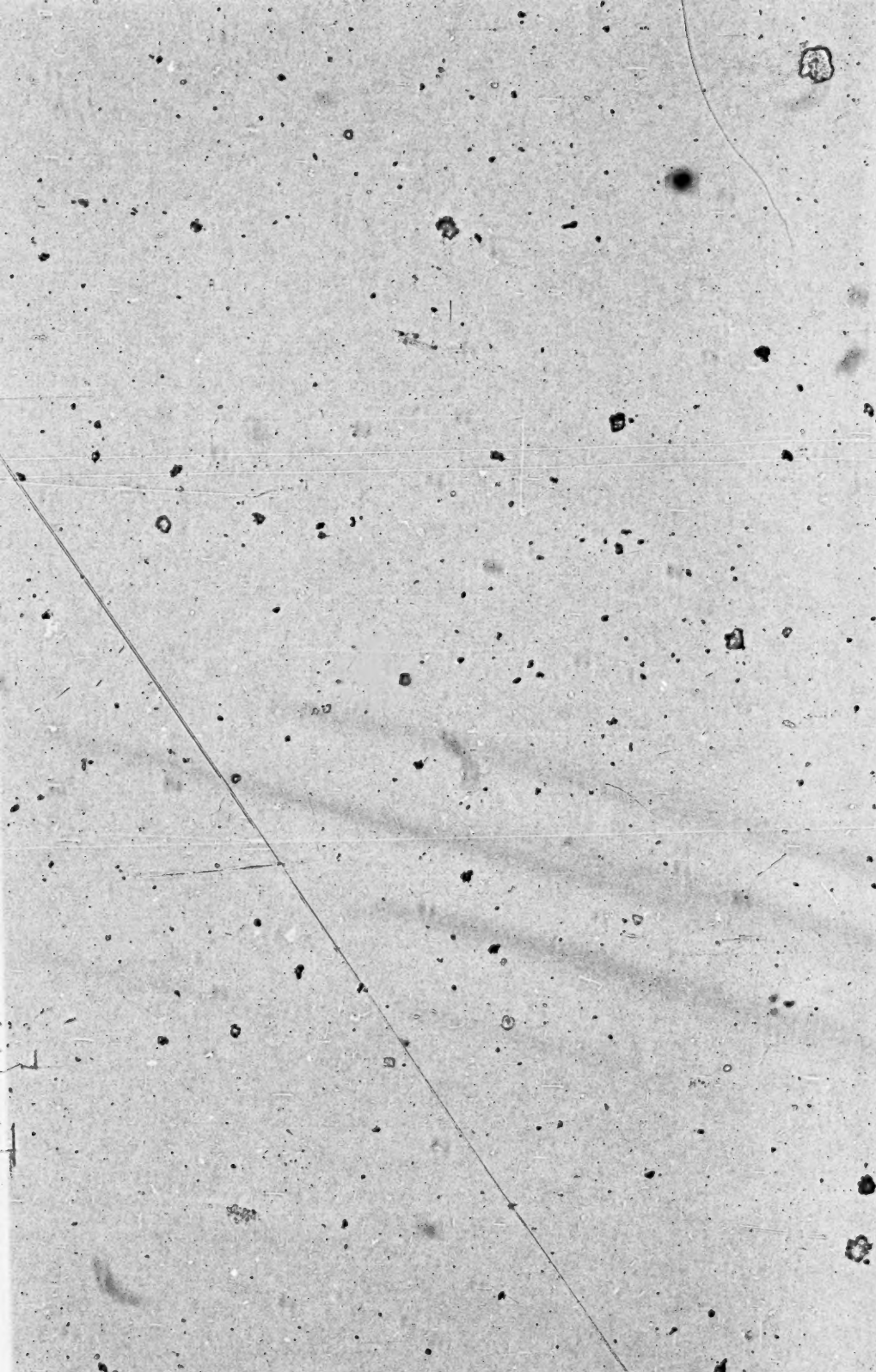
ALLAN P. MATTHEW,
JOHN O. MORAN,
Attorneys for Petitioner.

W. S. HEFFERAN, JR.,
135 South LaSalle Street,
Chicago, Illinois.

SIDLEY, MCPHERSON, AUSTIN & BURGESS
11 South LaSalle Street,
Chicago, Illinois.

F. W. MIELKE,
McCUTCHEN, OLNEY, MANNON & GREENE,
1500 Balfour Building,
San Francisco, California.
Of Counsel.

Dated at San Francisco, California, November 6, 1939.



Appendix

STATUTORY PROVISIONS INVOLVED.

Elkins Act, §1, par. 1 and 2:

"That * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *"

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act." Act of Feb. 19, 1903, 32 Stat. 847, c. 708, as amended by Act of June 29, 1906, 34 Stat. 587, c. 3591; 49 U. S. C. §41(1) and (2).

Interstate Commerce Act, §1(3):

"'The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.'" Act of Feb. 4, 1887, 24 Stat. 379 c. 104, as amended by Act of June 29, 1906, 34 Stat. 584, c. 3591, by Act of June 18, 1910, 36 Stat. 545, c. 309, by Act of Feb. 28, 1920, 41 Stat. 474, c. 91, and by Act of June 19, 1934, 48 Stat. 1102, c. 652; 49 U. S. C.

Car Service Amendment of 1917,

Interstate Commerce Act, §1(10), (11), (13) and (14):

"10 The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

. . . . . .

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation, and be subject to any or all of the provisions of this part relating thereto.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this part, including the compensation to be paid for the use

of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations, or practices." Act of May 29, 1917, 40 Stat. 101, c. 23, as amended by Act of Feb. 28, 1920, 41 Stat. 476, c. 91; 49 U. S. C. §1(10), (11), (13), and (14).

Interstate Commerce Act, §6(1):

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in

large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part." Act of Feb. 4, 1887, 24 Stat. 380, c. 104, as amended by Act of Mar. 2, 1889, 25 Stat. 855, c. 382, by Act of June 29, 1906, 34 Stat. 586, c. 3591, and by Act of Feb. 28, 1920, 41 Stat. 483, c. 91; 49 U. S. C. §6(1).

Interstate Commerce Act, §15(13):

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." Act of June 29, 1906, 34 Stat. 590, c. 3591, as amended by Act of June 18, 1910, 36 Stat. 553, c. 309, and by Act of Feb. 28, 1920, 41 Stat. 488, c. 91; 49 U. S. C. §15(13).